Office Supreme Court, U.S.
FILED
AUG 18 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 401

UNITED STATES OF AMERICA,
Respondent,

vs.

STATE OF SOUTH DAKOTA, GAME, FISH AND PARKS DEPARTMENT, IZAAK WALTON LEAGUE, BOY SCOUTS OF AMERICA, GIRL SCOUTS OF AMERICA, AND PIERRE COUNTRY CLUB,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FRANK L. FARRAR
Attorney General
State of South Dakota

JOHN B. WEHDE
Assistant Attorney General
State of South Dakota

E. W. STEPHANS
Pierre, South Dakota

WARREN MAY
Attorney for Lessee Defendants

E. L. MERSEREAU, INC., 1104 Oak Street, Kansas City, Mo. 64106, HArrison 1-2020

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit hereinafter identified.

I.

CITATIONS TO OPINION BELOW

Judgment of the Federal District Court, Central District, was entered in the above-captioned case on the 15th day of January, 1963 (Record 10-13) and the opinion of

the Federal Eighth Circuit Court of Appeals was handed down on the 8th day of April, 1964, reversing the District Court judgment (Appendix "A"). The petition for rehearing to the Eighth Circuit Court "*en banc*" was denied on May 19, 1964. The mandate of the Eighth Circuit Court of Appeals was entered on June 2, 1964. Judgment of the Eighth Circuit Court of Appeals was handed down April 8, 1964 (Appendix "B").

II.

JURISDICTION

It is submitted that Rule 19 of the Revised Rules of the Supreme Court, Section 1(b), and 28 U.S.C.A., Sec. 1254(1), confers the Supreme Court with jurisdiction to review the opinion of the Eighth Circuit Court of Appeals in that it has decided an important point of federal law in conflict with other decisions of Federal Circuit Courts of Appeal, which point has never directly, but should be, decided by the United States Supreme Court. Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Sec. 1254(1).

III.

QUESTIONS PRESENTED

The questions presented for Supreme Court review are as follows:

In a Federal Eminent Domain case, where state or governmental property is being acquired is it permissible for the trial court to allow the jury to consider evidence on costs of a substitute facility when admittedly there are no sales of property even purporting to be comparable, and when, moreover, it is impossible for such property to have a "market" for its admitted highest and best use?

Is it a violation of the Fifth Amendment to the Constitution of the United States to restrict a governmental condemnee to a criterion of "fair market value" when there is not and could not be a market for the property taken?

IV.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Article or Amendment 5 to the Constitution of the United States of America which is set forth as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use without just compensation.*" (Italics supplied).

V.

STATEMENT OF CASE

This case involves the condemnation of approximately 850 acres of land in South Dakota in connection with the Big Bend Reservoir (R. 1-4). Jurisdiction of the District Court was invoked under 28 U.S.C., Sec. 1358. The issue of compensation was tried before a jury, which awarded $1,068,250.00 (R. 286). Judgment was entered thereon on January 15, 1963 (R. 10). The case was appealed by the United States *et al.*, to the Federal Eighth Circuit Court of Appeals, which court reversed the judgment of the trial court in its opinion handed down on the

8th day of April, 1964 (Appendix "A"). The defendants' petition for a rehearing to the Eighth Circuit Court "*en banc*" was denied on May 19, 1964. A mandate of the Eighth Circuit Court of Appeals was entered on June 2, 1964, and judgment of the Federal Eighth Circuit Court of Appeals was entered April 8, 1964 (Appendix "B").

The facts may be summarized as follows:

The area condemned is known as Farm Island and has long been used as a public park. The evidence is uncontested that the condemned property was, at the time of taking, used by the citizens of the State of South Dakota as an integrated public park with, among others, the following attributes:

1. Residences and other structures and improvements.
2. A game refuge.
3. Historical site.
4. Thirty-four separate campgrounds with fireplaces.
5. Parking stalls and garbage receptacles.
6. Roads and park areas.
7. Girl Scout Camp with extensive improvements.
8. Boy Scout Camp with extensive improvements.
9. Golf course and club with extensive improvements.
10. Country Club with extensive improvements.
11. Park Headquarters.
12. A swimming and boating area with artificially created causeway which created a lake as well as improving access to the island.
13. A cleared and sanded beach for swimming area.
14. Fireplaces, shelters, fences, gates, over seven miles of all-weather roads.

15. Sub-irrigated water table for tree growth with excellent tree growth.
16. Scenic areas and 24-hour maintenance and service personnel.
17. Many other natural and man-made improvements.

(R. 25-41 and 229-240 and S.R. 1-93). The evidence is uncontested that this island with its natural and man-made attributes and improvements constituted the most completely integrated park in a several-state area (S.R. 18).

The State of South Dakota held a conditional fee title to Farm Island by virtue of a transfer by an Act of Congress of March 2, 1889, 25 Stat. 889, a Congressional Act of August 16, 1937, 50 Stat. 647-648, a Congressional Act of June 17, 1940, 54 Stat. 405 and a Congressional Act of August 4, 1947, 61 Stat. 740, which acts vested title in the State of South Dakota on the condition that it be used only for such purposes as are now or may hereafter be authorized by the laws of the State of South Dakota, exclusive of said Commission's right to sell the property. The effect of the grant was that the park could not be used for other than park, game refuge, and occupancy by lessees whose presence enhanced the use of the park or this park would revert to the grantor.

The Court of Appeals, without access to the exhibits showing the true nature of Farm Island, evidently adopted the Corps of Engineers' theory that Farm Island is merely another piece of soil that can be bought and sold in the market place. Such is not the case. Its character before forced inundation is much the same as it was in September of 1804 when first seen by Merriweather Lewis and William Clark.

Now, ugly fluctuating reservoirs cover all but a few miles of the famous Valley of the Missouri in the Dakotas.

Three miles of this historic valley remains that can be preserved before it is converted into cottage sites if the proper valuation theory of "replacement" is here given consideration. What is it that we have that we wish to replace which is not susceptible to a market approach? Comments on the Journal of Lewis and Clark in Volume IX, South Dakota Department of History Collection (1918), reveal what was seen by the "Voyageurs" as Farm Island was first approached.

Saturday, September 22, 1804

The fog was so heavy they could not make their way until after 7 o'clock but when it lifted they were entranced with the beautiful prairies which border on both sides of the river at this point. The pasture was excellent and the plains on both sides were literally alive with buffalo which were rolling in fatness. They passed the Three Sisters, which consisted of the two Islands now known as Dorian Islands and Cedar Creek, and on to an island near the east shore that has since become incorporated with the east mainland in Hughes County, two miles below the mouth of Chapelle Creek and about the same distance from DeGrey post office. It was beautiful, cedar covered island a mile and a half long and upon it Registre Loisel, of St. Louis had built a substantial trading post, a space about 70 feet square picketed in with cedar poles 13 1 2 feet above ground and with sentry boxes in two of the angles.

Monday, September 24, 1804

They called the very straight portion of the river from DeGrey to Pierre, the Grand Reach. They passed Farm Island which was but 1 1 2 miles long at that time and the main channel passed north of it. They "observed a great Deel of Stone on the Sides of the hills on the 'Stobbard'." They felt some anxiety about the reception they would receive from the Tetons.

The path of Lewis and Clark to Farm Island was followed by many others who enriched that area and the pages of American history. Jedediah Smith, contemporary of Bridger and in his own right one of the most famous of the mountain men, passed Farm Island in 1823. Opposite Farm Island in 1831 George Catlin painted a scene later described as depicting the largest number of North American Indians ever assembled on one occasion. Prince Maximillian and artist companion Carl Bodmer visited the Island on the steamer Yellowstone in 1833. Frederick Remington in later years while accompanying the Army in the "Sioux Wars" painted in the area. Farm Island for security purposes and because of its physical characteristics was the winter home of the Army in 1864. It was frequented by Crook, Sully, Custer, Sibley and Miles.

It was established that at the present time Farm Island is the second largest South Dakota park and that it is the only state park in the central portion of South Dakota within a radius of 200 miles, and that during the previous year there were 180,000 recorded visitations (S.R. 5-7). The State Forester testified regarding Farm Island as follows:

> "Our overall program is to provide a well distributed state park system which would be available—at least one park available to every citizen of the state in a reasonable driving distance, and of course, a park system which would preserve, protect and portray some of the outstanding and historical scenic qualities of the State. Of course, facilities which are short of supplies, they are not making state parks any more these days. You take what you have and you develop it as best you can, try to preserve it as best you can."

And further on the same page (S.R. 12) he testified further as follows:

"Well, Farm Island Park is one of the unique state parks, in that it offers practically all—I guess I could say safely—all of the recreational opportunities, natural Opportunities, historical opportunities that you would find in any state park. That is why Farm Island are particularly unique. It was famous historically as the Camp Site of the Lewis and Clark Expedition and it was a site for early pioneers and military people, who camped at Farm Island years ago. It has, of course, a representative—a good representative sample—of all the flora and fauna plants and animals that you are going to find native to South Dakota with the exceptions of antelope or a few others, but by and large the whole area was one of the outstanding examples of typically Missouri bottom land in this state. It is one of the last very few remaining areas in the old Missouri River bottom which still exist in this state. As you know, about the only other portion of the River which is left, the old river bottom which is left in this state, is that portion between the head of what will be Gavens Point Dam at Pierre and up to the toe of Oahe just five or six miles north."

It was established (S.R. 19-20) that Farm Island serves as a state-wide park headquarters in addition to a regular state park. Crews work there year-around constructing toilets, fireplaces, grills and miscellaneous items used throughout the entire state and that Farm Island is used as a test area for new types of park facilities as well as demonstration areas for recreation personnel. On Saturdays, Sundays during the summer as many as 1100 cars enter the park each day, and in an ordinary day 50 or 60 cars (S.R. 40). As many as 1500 people use the beach at one time (S.R. 40) and people even make use of the Park during the winter for observing wild life, ice skating and skiing and that year-around park personnel furnished wood and maintain warming areas at no cost (S.R. 35, 41).

The District Park Supervisor stated (S.R. 42) that church groups such as Lutheran, Methodist and Catholic periodically use the Park for gatherings. The park personnel have private places they can block off for them and that the lessees (other defendants) cooperate with these groups as far as holding dinners and things of that nature. Further, (S.R. 43) he stated that people write for reservations all over the United States who desire to use the Island for large groups and that groups of children coming from Minneapolis, Chicago and New York and other cities in the East, and usually separate camp grounds are provided for them, and the Girl and Boy Scout people cooperate in letting them use their facilities on these occasions.

The president of the Izaak Walton League testified (S.R. 84-91) that their league practices conservation, wild life preservation, and many other numerous wild life things as well as conservation of natural resources, and that the same is a nationwide organization. He further testified on behalf of his league, which is one of the several Defendants, that they meet twice a month on Farm Island and that they avera, 150 to 200 guests and that he had known many times when they had served as many as 450 people. He further testified their property was accessible to people desiring to use the barbeque facilities and that they have prepared meals for Oahe Trail Riders that come through and that overall between 6500 to 7000 use their facilities each year.

Mrs. Graff, representing the Defendant Girl Scouts testified (S.R. 69-71), that Farm Island has been a camp for Senior Girl Scouts from a three-state area, North Dakota, South Dakota and Minnesota and that it was extremely desirable for such purposes due to physical characteristics as well as protection (S.R. 69-70).

One of the Defendant Girl Scout representatives indicated (S.R. 124-130) that the Girl Scouts have many badges that pertain to the study of flora and fauna and nature in general, and in the natural habitat. She testified that the camp on Farm Island was a natural setting to study these things and work on their badges. The fact was established (S.R. 127) that during the past years they have had four different types of camping each year on the island, one for Brownie Scouts, one for Intermediate Scouts and one for Senior Round-up and Jamborees for Senior Scouts, 9th to 12th grades. All basic skills of outdoor cooking are taught to the Girl Scouts on the Island, by using excess wood for fireplaces. The girls set up the entire kitchen, cupboards, wash stands and the entire sanitary part of the cooking and that they have a water front program which is conducted on the state-maintained beach on Hipple Lake. It was indicated that the State of South Dakota provides wood, garbage disposal, extra facilities, physical protection and aid in any emergencies at any time during the day or night.

Mr. Conger, who is a member of the State Game, Fish and Parks Commission (S.R. 45) stated that the powers and duties of the Commission by law was required

> "To acquire by gift, purchase, lease or condemnation, improve and manage other land areas suitable for park purposes in various portions of the State, so that a comprehensive State Park System may be established."

He stated further (S.R. 47) that

> "The way I understand the law regarding our responsibilities, we are instructed to set up a comprehensive State Park System and if we lose one of those Parks that make up this System, I think we would be remiss in our duty if we did not replace it."

Regarding the appropriateness and applicability of the "fair market value" criterion for valuing real estate involved in condemnation, the Defendants value witnesses indicated that there was absolutely no way they could honestly apply such a criterion. Mr. Moffat summed up his position quite clearly in his statement (R. 21):

> ". . . and in spite of efforts that I made, I was unable to find any record of any property that would in any way compare with Farm Island that had been sold in the market."

As to the Plaintiff's position on sales of other property, the sales introduced fell so far short of meeting the test of comparability as set forth in condemnation case law, 118 A.L.R. 869, and 174 A.L.R. 386 (Annotations), 5 Nichols on Eminent Domain, 430-461, as to require only a passing comment. Of the seven sales introduced by Appellant's witness, Davis (R. 240-244) there was no foundation laid as to the use of the property at the time of the sales. We must assume, however, that they were agricultural properties, as four of the sale properties contained farm buildings as sole improvements. There was no comparability of size, five of the seven sales being 100 acres or less as compared with 844 acres for Farm Island, and the remaining two having acreages of 251.8 acres and 1645.22 acres respectively, although three of the sales involved portions of other islands, none of these had access (R. 256-257), nor was any foundation shown that these small islands had any permanency, physical longevity, soil structure, sub-soil irrigation, or natural growth which was enjoyed by Farm Island which was admittedly a permanent island even before the Lewis & Clark Expedition (R. 29). None of the sale properties were used for public park in any sense of the word, much less having a location, access, desirability, physical or man-made improvements or at-

tributes of Farm Island. Moreover, there is a question as to whether or not the seven sales introduced by Davis (R. 240-244) were offered or admitted as bearing upon the value of Farm Island.

Immediately preceding their introduction the record reveals the following (R. 239-240):

"Q. And in determining your valuation on the land, did you consider sales of other property?

A. I did.

Q. You have looked at these sales?

Mr. Bottum: Just a moment, Your Honor, I don't know what he means by land. I would like to know what they mean by land.

The Court: I suppose he means the ground that these lands rest on.

Mr. Wilds: The replacement land, same as their witnesses did, Your Honor."

From this discussion it can only be gathered that the sales to be introduced had bearing on the substitute site property rather than Farm Island and that there were no sales of comparable property offered in evidence bearing upon the value of Farm Island.

Mr. Moffet, Appraiser, for the Defendants, testified that he appraised the property on the basis of "replacement cost of the improvements, less depreciation, plus land value" (R. 21). On this basis his estimate of compensation was $1,678,000.00 (R. 55). To his replacement cost of improvements less depreciation he treated what he called "general improvements" consisting of a causeway, dike and breakwater were added as an improvement. Mr. Woolford, the second appraiser-engineer representing the Defendants testified:

> "The only way to find the value for that property is to start out with another piece of land and to build a piece of property which has the same capabilities as Farm Island" (R. 92).

On this basis he estimated $1,585,000.00 as compensation (R. 138).

Mr. Davis representing the Plaintiff, testified both on a market value criterion and on the substitute site criterion (R. 224 and 254-256 respectively), surprisingly resulting in $388,000.00 just compensation figuring it by either method.

The District Court Judge in a pretrial memorandum opinion (R. 4-9) held that the facts as presented by the parties showed a need existed to replace Farm Island.

Whether or not this ruling was premature or correct is not of paramount importance, as during the trial, the Judge allowed all parties to present evidence showing the necessity or lack of necessity for replacement of Farm Island with an integrated park of similar utilities (S.R. 5-8, 11-28, 45-48, 50-54, 57-65, 68, 86-91, 124-130, 150-160, and 130-150). Moreover, the District Court allowed testimony based on the criteria of fair market value by both parties (R. 20-45, Moffet, Appellee, and R. 225-247, Davis, Appellant) and in the District Court's final submission of the case to the jury, before, depending on two theories under which the case was presented, the general rule was as follows:

> "The law provides that property shall not be taken for public use without just compensation. Just compensation is the full and perfect equivalent in money of the property taken, so that the owner is to be put in as good a condition financially as he would have been if the property had not been taken. This means the property owner must be made whole for what is actually taken" (R. 278).

The Court went on to instruct the jury as follows (R. 278-279):

> "There has been evidence introduced in this case that the State has selected a substitute site for the establishment of a new State Park to replace Farm Island Park. If you find by a preponderance of evidence and under these instructions that the obligation and need for acquiring and establishing a substitute for Farm Island State Park exists, then the just compensation to which the State is entitled is the cost of acquiring a new site, the reproduction cost new less depreciation of the existing facilities and improvements on Farm Island State Park and the reasonable cost of developing the substitute site in so far as reasonably practicable to serve the State and its lessee's requirements and needs.
>
> On the other hand, if you do not find by a preponderance of the evidence that there is an obligation and need to provide a substitute State Park, then the just compensation to which the State is entitled is the reproduction cost new, less depreciation, of the existing facilities and improvements of the State and its lessees, and the value of the land, the Farm Island State Park land, for its highest and best use, being for park purposes."

The Court further submitted a special interrogatory to the jury which read as follows:

> "Do you find there is an obligation and need for the State of South Dakota, Department of Game, Fish and Parks to establish a substitute State Park for Farm Island State Park in this locality?
>
> You will answer that 'Yes' or 'No'. If your answer to this special interrogatory is 'Yes', you will then proceed to determine the award of just compensation by the method first stated, that is, the cost of acquiring a new site, the reproduction cost new, less depreciation, of the existing facilities and improvements on Farm

Island State Park, and the reasonable cost of developing a substitute site insofar as reasonably practicable to service the State's and its lessee's requirements. If your answer to this special interrogatory is 'No' you will then proceed to determine the award of just compensation by the method next stated, that is, the one following the one I just stated, that is, the reproduction cost new, less depreciation, of the existing facilities and improvements of the state and its lessees, and the value of the land for its highest and best use, being for park purposes."

The jury answered the interrogatory in the affirmative and returned its verdict in the amount of $1,068,250.00.

VI.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Eighth Circuit erred as follows:

1. In failing to recognize the exception to the "market value" criterion and the use of the "substitute" criterion for ascertaining "just compensation" in acquisitions of governmental facilities in the absence of a market for that being acquired.

2. In failing to recognize that since the "substitute" criterion has been held applicable for acquisitions of government roads, sewer systems, municipal parking lots, schools, towns, bridges and utilities. it, in all fairness, should and must be applied to a public park integrated and developed such as Farm Island and under the established facts of the case.

3. In failing to consider, apply or distinguish the logic and basis of the "substitute" criterion to the facts of this case.

VII.

REASONS RELIED UPON FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals on page seven of its opinion (Appendix "A") states as follows:

> "We do not believe, after careful review of the record, that there was need or justification for a departure from the concept of market value as the standard of just compensation in Federal Eminent Domain cases, and conclude that its submission on a substitute site area was prejudicial error which requires us to reverse."

It is submitted the above Court overlooked the matter of mixed law and fact insofar as the replacement site evidence was concerned. Assuming the District Court did reject fair market value merely by allowing substitute site evidence to go before the jury, it is submitted such theory was not only proper but should have been the only fair criterion for establishing just compensation under the law and facts of this case as contemplated by the Federal Constitution, Article V. The evidence showed that such property was not bought and sold, that the property could not even legally have been sold by the Defendants, that the area was unique by virtue of being the last remaining vestige of the beautiful Missouri River bottom land not yet covered by waters from the Federal Big Bend Dam and was made durther unique by the fact that the Park was integrated by virtue of having Boy and Girl Scout, Izaak Walton League and Country Club facilities, all of which had maintained substantial improvements complementary to Park purposes (S.R. 1-193). It is submitted that the most equitable criterion ascertaining "just compensation" in this case was the consideration of costs of a replacement facility. This method has been held proper in the

condemnation of sewer systems (*Town of Clarksville, Va.*, v. *United States*, 4th Cir., 198 F.2d 238, cert. den. 344 U.S. 927); Towns, (*Brown* v. *United States*, 264 U.S. 78, 44 S. Ct. 92, 68 L. Ed. 171); Bridges, (*U. S.* v. *State of Arkansas*, 8th Cir., 168 F.2d 943); Schools, (*U. S.* v. *Board of Education*, 253 F.2d 760, 1958, 4th Cir.); *State of Texas* v. *Waco Ind. School Dist.*, 364 S.W.2d 263, 1963; and Municipal Parking Lots, (*U. S.* v. *Certain Land in City of Red Bluff*, D.C. Calif., 1961, 192 F. Supp. 725). *See also in this respect *Mayor and City Council of Baltimore* v. *U. S.*, 4th Cir., 1945, 147 F.2d 786; 4 Nichols on Em. Dom. 746, Sec. 15.1(1) and Cumulative Supplement.

In *Brown* v. *United States, supra*, although the Congressional Act allowing condemnation to commence for construction of an irrigation project also provided authority to purchase or condemn property for a new townsite to replace the 3/4 of the Town of American Falls which would be inundated the case is substantial authority that the Supreme Court of the United States did not look unkindly at the "substitute site" theory under certain circumstances by its language on page 82:

> "The ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill-adapted to the exigency. It would be hard to fix a proper value on homes in a town thus to be destroyed without a prospect of their owners finding homes similarly situated on streets in another part of the same town, or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not restored in kind. . . . A method of compensation by substitution would seem to be the best means of making the parties whole."

In the case of *Town of Clarksville, Virginia*, v. *U. S., supra*, the federal government condemned for inundation

about 41% of the Town of Roanoke's present area and rendered useless its present water and sewer system.

Although it was agreed between the United States and the Town that it was the duty of the government to provide a substitute facility for the Town's present sewer system, they disagreed as to the extent of the replacement facilities. On page 242, the Court stated the general principles applicable to acquisition for municipal or governmental facilities as follows:

> "The general principles applicable to an eminent domain taking of municipal facilities are well established. The taking may be justly compensated by payment of the cost of substitute, so long as a full equivalent is offered for the property taken. (Citing cases) Of course, the interest of the public, upon which the payment burden rests, are at stake too, and the award must not be in excess of strict equivalence. Yet we are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment's mandate. Accordingly, the equivalent's requirement which must be met with respect to that substitute facilities more that of the utility than of mere dollar and cents value. Jefferson County v. Tennessee Valley Authority, 6th Cir., 146 F.2d 564, and the substitute facility must be that which the claimant is legally required to construct and maintain whether or not this type be more expensive or efficient than the facility which was condemned. (Citing cases)."

In this Clarksville case, the old sewer system was maintained on a gravity flow, whereas after the acquisition five lift pumps would be required as well as the fact that the county, after the taking, required that a treatment plant be installed. The Court held that the acquired authority in order to satisfy "just compensation" must pay

for the five lift pumps, a reasonable amount of money to maintain such lift pumps in the future, as well as full payment for the treatment plant.

It is submitted that this case is significant not only by virtue of the fact that it allows a flexible method of applying the substitute site measure, but it also sets forth quite clearly that the general rule in taking of municipal or governmental facilities is the cost of a substitute.

In the case of *United States* v. *State of Arkansas, supra,* there was a taking of roads and a bridge. The Federal Government was to construct a dam across which substitute roads would be constructed for the state, but there was a 14 month interim between the taking and the construction of the new roads and bridge. The Court in this case held as follows:

> "The proper measure of damages for the taking of public highways and streets in condemnation proceedings is well settled. The fundamental principle is the public authority charged with furnishing and maintaining the public way, whether it be a highway, a street, or a bridge, must be awarded the 'actual money loss which will be occasioned by the condemnation . . .' this amount is usually the cost of furnishing and constructing substitute roads." (Citing cases).

The Court in this case held that the acquiring authority must pay for the construction and costs in connection with a ferry which was used as a substitute during the 14 months as well as constructing substitute roads and a bridge in order to satisfy "just compensation".

In the case of *United States* v. *Board of Education, supra,* the Federal Government acquired a portion of land from the school which had the apparent effect of curtailing the school's activities. The Fourth Circuit Court

of Appeals approved the Lower Court's instructions to the jury which in part are as follows:

> "We now turn to the formula which the Courts have devised if you should find, from a preponderance of the evidence, that the property taken had no market value at the time of taking."
>
> "The Courts have said that where a portion of the tract of land is taken, and the land so taken has no market value at the time of taking, replacement costs or substitution cost is appropriate for consideration in reaching a judgment concerning the value which is just compensation. Under this formula, it appears that the Defendant would be entitled to have the land taken substituted, by replacement with lands with the same proximity if reasonably possible, and if the Board of Education is required to continue to provide the same facilities for its education, athletic and recreational programing conducted at the time of taking by the government. The cost in money of providing such replacement and such substitution facilities of our land would then be just compensation to the Board of Education. Under this formula, one of the most important questions for you to decide is whether or not the Board of Education is so required to continue in effect the same educational, athletic and recreational program which was conducted on these high school lands of the Board of Education at the time of the taking by the Government. You may reach the conclusion that it is not necessary for the Board of Education to so continue, and if you should so conclude, you should consider whatever is necessary, as shown by a preponderance of the evidence to be necessary, in order to determine whether the proper equivalent of substitute for the lands taken herein; in other words how much loss will be suffered by the Board of Education by reason of the taking of a portion of its property."

In this case, the Appellate Court referred to the "Substitute Site" criterion of ascertaining "just compensation" commented as follows:

> "Ordinarily, of course, market value is the measure of compensation in condemnation cases; and the difference in market value of the residue before and after taking is ordinarily a fair measure of severance damage. As said in United States v. Cors, 337 U.S. 325, 332, 69 S. Ct. 1086, 1090, 93 L. Ed. 1392, however, we are not to make a fetish or market value 'since it may not be the best measure of value in some places' where the highest and best use of the property is for municipal or governmental purposes, as to which no market value properly exists, some other method of arriving at just compensation must be adopted, and the cost of providing property in substitution for the property taken may reasonably be the basis of the award".

The *United States* v. *Board of Education*, case, *supra*, as a basis for utilizing the substitute criterion in arriving at just compensation quotes at length from the case of *Brown* v. *United States, supra, Town of Clarksville* v. *United States, supra*, and *Mayor and City Council of Baltimore* v. *United States*, Fourth Cir., 147 F.2d 786, 790.

In the case *United States* v. *Certain Land in City of Red Bluff, supra*, the Federal Government acquired property which was a part of the city public parking lot. The issue to be resolved arises from the fact the Plaintiff contended that the proper means of valuating the property in the case was market value, whereas Defendant contended that the proper measure was the cost of substitute facilities.

The question was presented to the District Court at a pre-trial hearing. A portion of the reported case which is applicable to the case at bar, is quoted as follows:

> "Plaintiff contends that the only reason that the cost of substitute facilities is on occasion used as a measure of value is because property (for instance a school or

a road) has no market value. Plaintiff argues that as regards to this case it is impossible to find the market value since there are parking lots in private hands which are the subject of sale. Schools and roads do, of course, have a market value, but such a standard of measurement has been rejected because it does not provide 'just compensation'."[1]

"One of the major distinctions between a business operation by a municipality, a state, or a governmental body and a business operated by a private enterprise is the fact that the former can operate indefinitely at a loss, whereas a business operated by a private enterprise cannot be operated unprofitably—certainly not for any substantial period of time. A road is built and maintained for the public benefit. It brings no cash return to the governmental body which builds it. It is patent that a private individual who owned the same land would not put it to such use. If the Federal Government takes a State road, in connection with a project which is of a scope such as to obviate the need for the road, then the State is relieved of the expenses of maintaining the road. Just compensation is therefore nothing, since the State has been relieved of a bur-

---

1. It must be admitted that property can be described as having no market value at the time of taking, if the governmental body, at the time has no right to sell it (*Mayor and Council of City of Baltimore* v. *United States*, 4th Cir., 147 F.2d 786). In the Baltimore case, a market value, in the sense that Plaintiff in the instant case uses that term, had apparently been established at the figure of $5,431.00. If Defendant in the instant case had no right to sell the parking lot in the circumstances that existed at the time of the taking, then the lot had no market value in the sense of that term as used in the Baltimore decision. A much better way to state the proposition is this: Property dedicated by a governmental body to a public use, which brings the body no income, or less income than the cost of maintaining it, should not be valued by a market value test. Such valuation would not be valued by a market value test. Such valuation would obviously be unreasonable under the circumstances.

den rather than being deprived of the benefit." (Citing cases).

The Court in its pre-trial ruling stated as follows:

> "No good reason is made to appear why this same rule should not apply to a parking facility, in a proper case. In the instant case, the parking lot involved is admittedly a public use of the property. The lot is not operated by Defendant as a mere money-making proposition, but to fill a public need. If there existed a public need at the time of the taking which made it reasonably necessary that a parking lot of comparable facilities be operated in the vicinity, then just compensation should be an amount equal to the cost of the substitute lot. If the taking were of such character as to obviate the need for a lot, and if the lot were operated at a less return than the cost of maintaining and operating, then the Defendant would be relieved of a burden rather than of an asset, and just compensation would be nothing."

See also *State of Texas* v *Waco Ind. School Dis.*, 364 S.W.2d 263 (1963), which cites with approval and as a basis for its opinion the above-quoted cases and contains the utilization of the "Substitute Site" criterion for ascertaining just compensation.

Your petitioner feels the Eighth Circuit Court of Appeals in its opinion has in effect deprived the Defendants of "just compensation" under such Article Five of the Constitution of the United States by blindly adhering to the criterion of "market value". It is submitted further, that the Court has rendered an opinion which is not only in direct conflict with opinions rendered by other Federal Circuit Courts of Appeal but a decision which is also partially in conflict with an opinion rendered by the Supreme Court

of the United States, all of which cases are specifically cited, *supra*, in this section.

It is submitted that the question as to "Substitute Site" criterion of "just compensation" is of the most vital concern of the Defendants in this case and, moreover, the question has much broader significance as the Federal Government and State Governments continue to expand their powers and exercise of Eminent Domain.

Applied to this case the natural characteristics of Farm Island, combined with intended improvements, make it desirable in accordance with "state park" concepts in contrast to local or limited park areas. It was improved for a particular legitimate purpose. Such adaptation and improvement took it out of the market as no market for a park which is its highest and most beneficial use exists. Its beauty and livability is such that if it were close to an urban or "near urban" area it could be fairly received in the market for a secondary use for residential purposes. However, Pierre the largest community within 110 miles enjoying a population of only 11,000 inhabitants creates no such secondary demand to support its sale for residential development.

The language of the decision compels the landowner to seek just compensation by proving the market value of a commodity for which there is no market. The language not only compels the impossible, but forever constricts a basic concept of eminent domain. We submit that the gigantic forced takings now inherently necessary in a complex society impose sufficient burdens on the justness of the "right to take" without further construction.

I respectfully pray, that the Supreme Court of the United States accept jurisdiction of a case such as this involving a "Substitute Site" criterion of value and set some guidelines for this as well as other acquisitions from govern-

mental bodies wherein there is and cannot be a "fair market value" as the term is commonly understood in case law.

E. W. STEPHANS,
Pierre, South Dakota,
FRANK L. FARRAR,
Attorney General,
State of South Dakota,
JOHN B. WEHDE,
Assistant Attorney General,
State of South Dakota,
WARREN MAY,
Attorney for Lessee Defendants.

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,354.

United States of America,
Appellant,
vs.
State of South Dakota Game, Fish and Parks Department, Izaak Walton League, Boy Scouts of America, Girl Scouts of America and Pierre Country Club,
Appellees.

Appeal from the United States District Court for the District of South Dakota.

[April 8, 1964.]

Before Van Oosterhout and Blackmun, Circuit Judges, Davies, District Judge.

Davies, District Judge.

This case reaches us on appeal from a judgment rendered in the United States District Court of South Dakota in eminent domain proceedings in which 848.26 acres of land had been taken and for which a jury awarded appellees a total of $1,062,250.00. Jurisdiction in the court below was invested under 28 U.S.C., §1358. Jurisdiction in this court is based upon 28 U.S.C., §1291.

There is here involved the condemnation of the indicated acreage of South Dakota land in conjunction with the Big Bend Reservoir project. The area is commonly described as Farm Island and has for a long time been used as a public park. Although the realty was originally an island in the Missouri river, it has been connected at both ends to the mainland by fill and accretion, thus forming a body of water between the connecting strips called Hipple Lake. The nature of the State's interest is adequately recited in appellant's brief, but we set out so much thereof here as may be necessary to an understanding of it.

By an 1889 Act of Congress, 25 Stat. 889, there was ended a series of negotiations with Sioux Indians which provided for a division of the Sioux Reservation and opened the lands to entry, with the exception of three islands in the Missouri which were withheld from entry in identical terms. The provision for Farm Island was as follows (p. 897):

> "Farm Island, an island in the Missouri River near Pierre, in the Territory of Dakota, and now a part of the Sioux Reservation, is hereby donated to the said city of Pierre: *Provided further,* That said city of Pierre shall formally accept the same within one year from the passage of this act, upon the express condition that the same shall be preserved and used for all time entire as a public park, and for no other purpose, to which all persons shall have free access; and said city shall have authority to adopt all proper rules and regulations for the improvement and care of said park; and upon the failure of any of said conditions the said island shall revert to the United States, to be disposed of by future legislation only."

In 1937 by Act of Congress, 50 Stat. 647, 648, Farm Island was designated as a Wild Game Refuge and pro-

vision was made for criminal penalties for violation of provisions of the Act. In June of 1940, 54 Stat. 405, the Congress specified that the City of Pierre, South Dakota, could own and operate certain recreation facilities and lease land for certain purposes, providing all receipts therefrom should be used for development and maintenance of the Island; and ultimately in August of 1947, 61 Stat. 740, the Congress authorized the City of Pierre to transfer its interest in Farm Island to the South Dakota Department of Game, Fish and Parks to be "used only for such purposes as are now or may hereafter be authorized by the laws of the State of South Dakota, exclusive of said Commission's right to sell the property."

The State of South Dakota resisted the condemnation on the grounds of lack of authority to condemn. The District Court denied the State's motion to dismiss. *United States* v. *929.70 acres of land et cetera*, 205 F. Supp. 456. We think the District Court correctly refused to dismiss the proceedings.

Appellant asserts that the District Court erred in rejecting market value as the method of compensation. We address ourselves first to that issue since in our view it is of paramount importance and its resolution determinative of our disposition of this appeal.

In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5, the United States Supreme Court, speaking through Mr. Justice Frankfurter, said:

> ". . . 'Value is a word of many meanings.' *Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U.S. 276, 310. For purposes of the compensation due under the Fifth Amendment, of course, only that 'value' need be considered which is attached to 'property,'[2] but that only approaches by one step the prob-

"2. U. S. Const., Amend. V: '. . . nor shall private property be taken for public use, without just compensation.'

lem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of non-transferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09. Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation. *McGovern v. New York*, 229 U.S. 363; *United States ex rel. T. V. A. v. Powelson*; 319 U.S. 266

"The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent. But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the 'market price' becomes so important a

standard of reference.[3] But when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. Cf. *Old South Association v. Boston*, 212 Mass. 299, 99 N.E. 235."

In *Olson v. United States*, 292 U.S. 246, 254, the Supreme Court had this to say:

". . . The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324: 'In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use

---

"3. Once taken, of course, property can have no actual market value except as giving rise to a claim against the taker. See 1 Bonbright, The Valuation of Property 414 (1937). In view of the resulting necessity of postulating a hypothetical sale, care must be taken to avoid the extremes, on the one hand, of excluding the value of the property for special uses and, on the other, of supposing the hypothetical purchaser to have either the same idiosyncrasies as the owner (compare *L. R. Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S.W. 792, with *Producers' Wood Preserving Co. v. Commissioners of Sewerage*, 227 Ky. 159, 12 S.W.2d 292) or the same opportunities for use of the property as a taker armed with the power of eminent domain (see e.g., *United States v. Chandler-Dunbar Co.*, 229 U.S. 53; *McGovern v. New York*, 229 U.S. 363; *Olson v. United States*, 292 U.S. 246; *United States ex rel. T. V. A. v. Powelson*, 319 U.S. 266).

of private property for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 399.

"That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306. *Jacobs* v. *United States*, 290 U.S. 13, 17. 2 Lewis, Eminent Domain, 3d ed., §682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States*, 262 U.S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases*, 230 U.S. 352, 454.

"*Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.* *Boom Co.* v. *Patterson*, 98 U.S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U.S. 227. 2 Lewis, Eminent Domain, ed., 220, p. 671." (Emphasis supplied.)

3d ed., §707, p. 1233. 1 Nichols Eminent Domain, 2d

We do not believe, after a careful review of the record, that there was need or justification for a departure from the concept of market value as the standard of just compensation in Federal eminent domain cases and conclude that its submission on a substitute site theory was prejudicial error which requires us to reverse.

This appeal contains elements somewhat novel in nature. In its Memorandum Decision filed September 19, 1962, following a pre-trial conference two days earlier, the District Court held, without the taking of testimony, that "In this case a need exists to replace the property and facilities taken."

At the conclusion of the case, the Court, apparently *sua sponte*, submitted to the jury a special interrogatory which read:

> "Do you find that there is an obligation and need for the State of South Dakota, Department of Game, Fish and Parks, to establish a substitute state park for Farm Island State Park in this locality?"

To which the jury replied, "Yes."

We think this interrogatory, couched as it was, contained a mixed question of law and fact. Whether South Dakota was "obligated" to establish a substitute state park for Farm Island State Park was a question of law for the Court and not a question of fact for the jury. The question of "need" would, of course, be a factual question for jury determination if the interrogatory were either necessary or proper. Since we conclude that the case should have been submitted to the jury on the fair market value concept, it was error to have submitted the interrogatory. Moreover, to the extent that the subject matter was appropriate for jury consideration, we think it

could have been included in the general instructions to the jury.

We do not wish to be understood as denying to the trial Court such liberality and flexibility in the reception of evidence as the circumstances may require so long as market value is not abandoned as the ultimate test in this case. See *Clark* v. *United States*, 8th Cir., 155 F.2d 157; *United States* v. *Devore*, 8th Cir., 133 F.2d 694; *United States* v. *City of Jacksonville*, 8th Cir., 257 F.2d 330, 334.

Other questions have been raised and considered by us upon this appeal. We think it unnecessary to discuss them individually since it is unlikely they will arise on a retrial of this case in view of the conclusions we reach on the instant appeal.

The judgment of the District Court is reversed and the case remanded for a new trial.

A true copy.
Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.
By s/ Lillian W. McDermott,
(Seal) Chief Deputy Clerk.

APPENDIX B

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 17,354. September Term, 1963.

Wednesday, April 8, 1964.

United States of America,
Appellant,

vs.

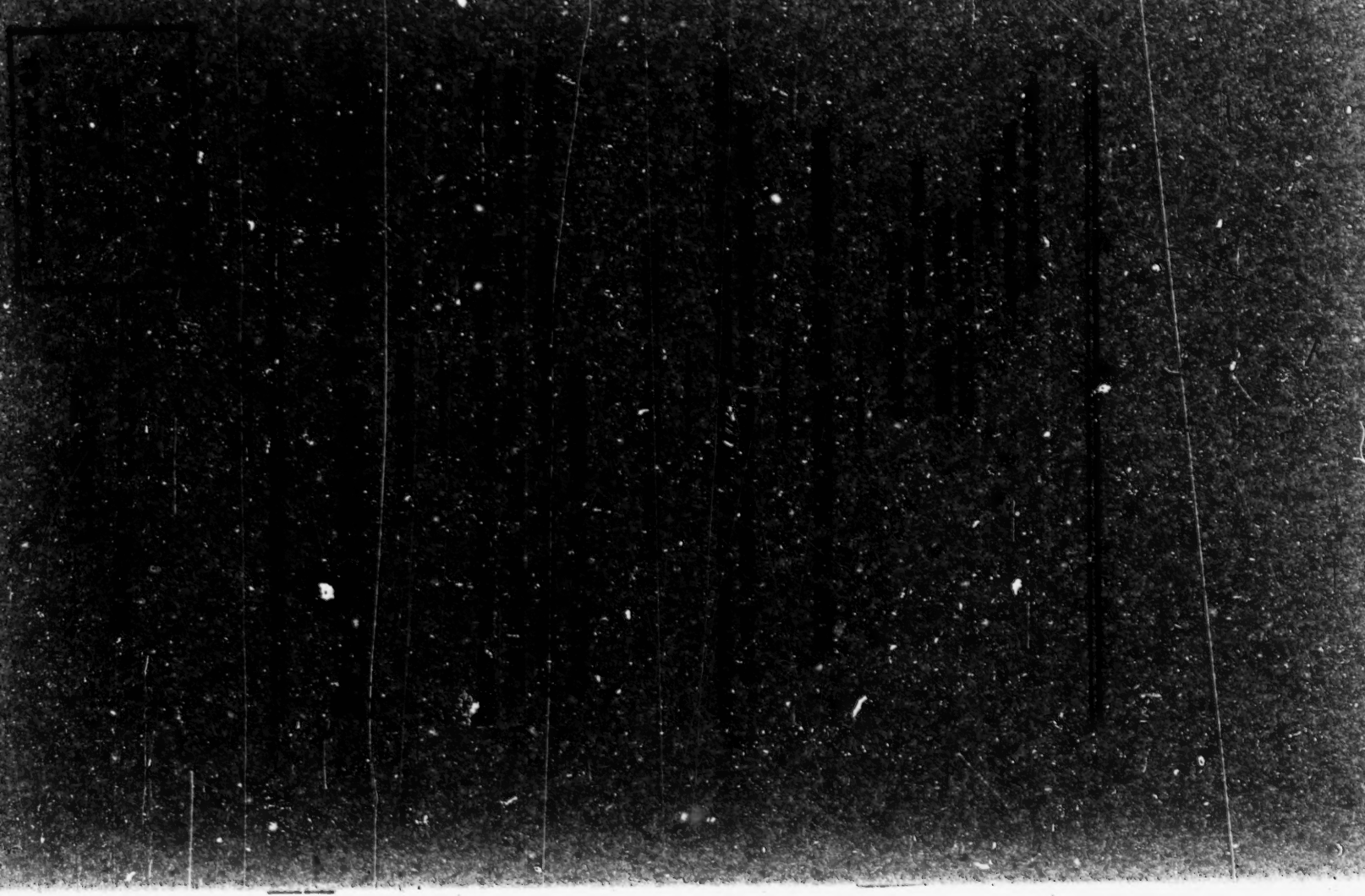
State of South Dakota, Game, Fish and Parks Department, Izaak Walton League, Boy Scouts of America, Girl Scouts of America, and Pierre Country Club.

Appeal from the United States District Court for the District of South Dakota.

This Cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed. It is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court for a new trial.

April 8, 1964.



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747-028—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 401

STATE OF SOUTH DAKOTA, GAME, FISH AND PARKS DEPARTMENT, IZAAK WALTON LEAGUE, BOY SCOUTS OF AMERICA, GIRL SCOUTS OF AMERICA, AND PIERRE COUNTRY CLUB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A8) is reported at 329 F. 2d 665.

JURISDICTION

The judgment below was entered on April 8, 1964 (Pet. App. A9). A timely petition for rehearing *en banc* was denied on May 19, 1964. The petition for certiorari was filed on August 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that, upon the condemnation by the United States of a public park owned by the State of South Dakota, the proper measure of just compensation is the fair market value of the property, rather than the cost of replacing the property with an identical facility.

STATEMENT

This case involves the condemnation of some 850 acres of land in South Dakota in connection with the Big Bend Reservoir Project. The land, commonly known as Farm Island, has long been used as a public park.[1] Although originally an island in the Missouri River, it has been connected at both ends to the mainland by fill and accretion.

At the trial, the government's expert witness testified as to the market value of the property. He took into account the sales of other nearby land, including islands (R. 240–245, 248–252), and the reproduction cost less depreciation of the improvements, including a nine-hole golf course (R. 239). His estimate of market value was $386,900, an amount which, in his view, coincided with the cost of a substitute facility.

The witnesses for South Dakota, eschewing the market value approach, testified instead to the cost which the State would incur in exactly duplicating Farm Island. Their estimates of land value, and also of reproduction cost less depreciation of the buildings

[1] As set forth in the opinion of the court of appeals (Pet. App. A2–A3), the land was donated to South Dakota by the United States in 1889 to use for park purposes and could not be sold.

and golf course, were substantially the same as the government's. However, they arrived at estimates of $1,585,000 to $1,678,000 (R. 55, 138) by including such items as $811,000 for a dike and breakwater which had been built by the Civilian Conservation Corps in the 1930's (R. 31–32, 82–83); $337,000 to construct, and $360,000 to operate, an irrigation system on the substitute site which would duplicate Farm Island's ground water table so that identical trees could grow (R. 98–99, 114, 178); $171,300 for planting identical trees (R. 178–179); and $113,000 to construct, on the substitute facility, a lake with a plastic bottom to provide swimming and boating facilities comparable to those available on Farm Island (R. 118).

The district court ruled that the highest and best use of the land was for park purposes and that just compensation must be based upon the cost of replacing the property with a physically identical substitute facility. The jury returned a verdict of $1,062,250 (R. 286), upon which judgment was entered (R. 10). The court of appeals reversed, holding (Pet. App. A7):

> We do not believe, after a careful review of the record, that there was need or justification for a departure from the concept of market value as the standard of just compensation in Federal eminent domain cases and conclude that its submission on a substitute site theory was prejudicial error which requires us to reverse.

ARGUMENT

1. The decision of the court of appeals, adhering to market value as the proper measure of compensation, is plainly correct. This Court has repeatedly held

fair market value is the measure of just compensation in federal eminent domain cases. See, *e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, and *Olson v. United States*, 292 U.S. 246. And the normal market value standard has been held applicable to the condemnation of park property. *Westchester County Park Commission v. United States*, 143 F. 2d 688 (C.A. 2), certiorari denied, 323 U.S. 726.

Petitioners attempt (Pet. 16-25) to bring Farm Island within the one recognized exception to the market value concept, *i.e.*, the rare situation in which the property (*e.g.*, roads, bridges, sewers), by its very nature, has no market and hence no market value, but in which the public authority will be required to expend funds to replace the condemned facility or function. In such cases "just compensation" is the cost of a necessary substitute facility. But Farm Island, like any other tract of land, had a market value readily ascertainable through the application of normal appraisal methods. To be sure, it might have been difficult for the State to find a private buyer who wished to use Farm Island as a park. Perhaps, too, the highest amount which the property would bring on the open market would be somewhat less than the State has invested in it or would be prepared to invest in

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See, *e.g.*, *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C.A. 4); *Town of Clarksville, Va. v. United States*, 198 F. 2d 238 (C.A. 4), certiorari denied, 344 U.S. 873; *United States v. State of Arkansas*, 164 F. 2d 943 (C.A. 8), cited by petitioners; and *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217 (C.A. 5); *State of Washington v. United States*, 214 F. 2d 33 (C.A. 9), certiorari denied, 348 U.S. 862. Cf. *Bauman v. United States*, 263 U.S. 78.

a substitute facility. The fact remains, however, that the land did have a market and therefore a market value, and that the government, as condemnor, is required to pay no more than a willing buyer would pay for the property with a view to its most profitable use. The measure of just compensation is not the special and peculiar value which the property has for the condemnee, as evidenced by the amount he would spend to replace it, but the value it has for potential purchasers. Thus, while such features of Farm Island as its accessibility (which it owes to the dam and breakwater), the high water table, the trees, and the swimming and boating facilities are highly relevant to a determination of just compensation, they are compensible only insofar as they enhance, and thus are reflected in, the fair market value of the property. This is a question which the jury should have been permitted to consider.

Petitioner urges that the other properties upon whose sales the government's witness relied were not comparable to Farm Island. We disagree. But in any event, the extent to which the other properties were comparable, and the amount, if any, by which the prices paid for those properties required adjustment to take into account special advantages enjoyed by Farm Island, were questions which should have been considered within the framework of the market value approach.

We note, finally, that the condemnation award could not properly be defended on the basis of the alleged historic importance of Farm Island. For petitioner presented no evidence and made no suggestion in the

condemnation proceedings that the property was valuable as a historic site. And there is no reason to suppose that the jury's award attributed any value to Farm Island on this ground.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys.

OCTOBER 1964.

U. S. GOVERNMENT PRINTING OFFICE 1964